

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

ELECTRICAL ENGINEERING AND  
ELECTRONICS, INC.,

Plaintiff

v.

Civil No. 99-274-B

E.L. SHEA, INC., and FIDELITY AND  
DEPOSIT COMPANY OF MARYLAND,

Defendants

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER**

This action arises out of the construction of the Squadron Operations Building for the Maine Air National Guard in Bangor, Maine. The owner of the project was the Maine National Guard. The general contractor for the project was Defendant E.L. Shea, Inc., and Defendant Fidelity and Deposit Company of Maryland issued the project performance and payment bonds for Shea. The electrical subcontractor was Plaintiff Electrical Engineering and Electronics, Inc. (hereinafter "3E"). In the early stages of the project, a representative of the owner told 3E that the contract specifications required the use of building wire and raceway. 3E disagreed with the owner's interpretation of the contract requirements, and after being denied a change order, filed this suit requesting additional compensation for the cost of materials and labor related to the substitution of electrical metallic tubing ("EMT") and building wire for metal clad cable ("MC cable"). Specifically, 3E asserts three claims: breach of contract against E.L. Shea (Count I); violation of the terms of the bond, 14 M.R.S.A. § 871, against Fidelity and Deposit Company of

Maryland (Count II); and violation of Maine's prompt payment statute, 10 M.R.S.A. § 1118, against E.L. Shea. Defendant Shea claimed as an affirmative defense offset for items it claims are due and owing from 3E on the original contract.

## **I. FACTS**

The evidence presented at trial was, for the most part, undisputed. Ken Wood, President and owner of 3E, prepared and submitted a bid for the electrical work on the Maine Air National Guard Squadron Operations Building in Bangor, Maine. Prior to submitting the bid, Mr. Wood reviewed the electrical specifications of the Project Manual for the Squadron Operations Building. *See* Plaintiff's Ex. 1, Project Manual. In order to prepare a bid for the project, Mr. Wood did a takeoff for the project, estimating the cost of labor and materials involved in the installation of each electrical system. *See* Plaintiff's Ex. 3. Mr. Wood testified that 3E calculated its bid for the lighting system using MC cable for the lighting system. With respect to both the fire alarm and the security alarm systems, Mr. Wood based his bid on the use of fire alarm cable. Upon completion of the takeoff, 3E submitted a telephone bid in the amount of \$718,707. *See* Plaintiff's Ex. 4. The bid for the electrical work submitted by 3E was the lowest bid, and the general contractor, E.L. Shea, awarded the electrical subcontract for this project to 3E. *See* Plaintiff's Ex. 6.

Construction on the Squadron Building began in the spring of 1997. In February 1998, while performance of the electrical subcontract was in progress and after large quantities of MC cable had been delivered to the building site, one of the owner's representatives, George Ames of Ames and Hewitt, advised 3E that MC cable was not an approved wiring method. At the time that he informed 3E of this, Mr. Ames admitted in a memorandum that the specifications for MC cable should not have been included in the electrical specifications of the Project Manual. *See* Plaintiff's Ex. 124. As a result of this information, 3E submitted a request for a change order seeking

additional compensation for the cost of labor and materials for the substitution of building wire and EMT for MC cable in the lighting system. 3E's request for a change order with respect to the use of building wire and EMT was denied, based upon an interpretation of the electrical specifications by an owner's representative. *See* Plaintiff's Ex. 93. The project engineer and the project architect admitted that MC cable "should not have been included" in the electrical specifications and "it was incorrectly listed as a project material." Plaintiff's Ex. 99. *See also* Plaintiff's Ex. 93 (specification for MC cable "inadvertently was not edited out of the master specification"); Plaintiff's Ex. 124 ("Metal clad [cable] is specified in 16050 2.10C, but it should not have been there."); Plaintiff's Ex. 52 ("It is the architect's opinion that MC cable was incorrectly listed as a project material and was not intended to be used on the project as it is not listed for use.")).

With respect to 3E's work on the fire alarm system and the security alarm system, Mr. Wood based his takeoff on these portions of the work using fire alarm cable. He also made submissions of fire alarm cable for these two systems. The owner approved fire alarm cable for use in both systems. Subsequent to the submission and approval, the owner's representative instructed 3E that the fire alarm cable that 3E had specified for the fire alarm and security alarm systems would have to be placed in EMT. Based on this request, 3E submitted requests for change orders for the cost of labor and materials to install EMT in conjunction with the fire alarm and security systems. *See* Plaintiff's Exs. 101 and 102. E.L. Shea, based upon an interpretation of the electrical specifications by Ames and Hewett, rejected both requests for change orders.

## II. DISCUSSION

### A. Applicable Legal Standards<sup>1</sup>

The interpretation of a contract term is a question of law. A contract term is ambiguous if it is susceptible to more than one reasonable interpretation. *See C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). In determining whether a contract is rendered ambiguous by possibly conflicting provisions, the Court should attempt to construe the contract as a whole, giving reasonable meaning to all of the contracts provisions to effectuate the spirit and purpose of the contract, rather than render portions of the contract inoperative. *See Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996); *Cherry Hill Sand & Gravel Co., Inc. v. United States*, 7 Cl. Ct. 357 (1985) (quoting *Thanet Corp. v. United States*, 591 F.2d 629, 633 (Ct. Cl. 1979)). One clause should not "be construed as being in conflict with another unless no other reasonable interpretation is possible." *Mason v. United States*, 615 F.2d 1343, 1348 (Ct. Cl. 1980) (quoting *Bishop Engineering Co. v. United States*, 180 Ct. Cl. 411, 416 (1967)). If the Court finds the language of the government contract ambiguous, then it must determine whether such ambiguity is latent or patent. If the language is latently ambiguous, the contractor is entitled to recovery based on a reasonable interpretation of the contract. If the language is patently ambiguous, however, the contractor has a duty to inquire about the ambiguity before bidding. *See Dalton*, 98 F.3d at 1306. By failing to inquire about the ambiguity, the contractor forfeits the opportunity to rely upon its unilateral, uninformed interpretation and bears the risk of

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<sup>1</sup> The parties rely exclusively on cases in which the United States government is a party and applying legal standards applicable to government contracts. The contract in this case is between two private entities – E.L. Shea and 3E. *See* Plaintiff's Ex. 6. The United States of America, once a Third-Party Defendant, was dismissed without prejudice prior to commencement of trial. The Court assumes that the parties' reliance on government contracts case law results from their interpretation of the provision in the electrical subcontract naming the agreement between the United States and E.L. Shea as one of the documents incorporated into the electrical subcontract and its provisions binding upon 3E and E.L. Shea. *See* Defendants' Ex. 1 at § 1.1. The Court will apply the government contracts case law because the parties agree to its application and it appears to be a reasonable interpretation of the contractual provisions in evidence.

misinterpretation. *See id.*

What constitutes a patent or major discrepancy or ambiguity is defined on a case-by-case basis. *See Max Drill, Inc. v. United States*, 427 F.2d 1233, 1244 (Ct. Cl. 1970) (citing *L. Rosenman Corp. v. United States*, 390 F.2d 711, 713 (Ct. Cl. 1968)). Since the patent ambiguity doctrine has the effect of relieving the government from the consequences of its own poorly drafted contracts, the doctrine has been applied only to contract ambiguities that are judged so plain or glaring that it is unreasonable for a contractor not to discover and inquire about them. *See Beacon Constr. Co. of Mass. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963). More subtle ambiguities are deemed latent and are accorded an interpretation favorable to the contractor under the doctrine of *contra proferentum*. *See Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434 (Fed. Cir. 1992). The Federal Circuit Court has explained that if a contract contains an ambiguity, as a general rule, the ambiguity will be considered a latent ambiguity. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997). The court has further emphasized that a finding of patent ambiguity is the exception to the general rule. *See id.* at 1474.

### **B. Lighting System**

MC cable is a factory prewired assembly of conductor wires tightly packed into a bundle and bound by a metallic covering. *See Defendants' Ex. 22B*. Existing wires cannot be removed from such assembly and extra wires cannot be added. By contract, the NATIONAL ELECTRIC CODE defines "raceway" as

[a]n enclosed channel of metal or nonmetallic materials designed expressly for holding wires, cables, or busbars, with additional functions as permitted in this Code. Raceways include, but are not limited to, rigid metal conduit, rigid nonmetallic conduit, intermediate metal conduit, liquidtight flexible conduit, flexible metallic tubing, flexible metal conduit, electrical nonmetallic tubing, electrical metallic tubing, underfloor raceways, cellular concrete floor raceways,

cellular metal floor raceways, surface raceways, wireways, and busways.

Defendants' Ex. 36 at 70-32. In essence, the use of a raceway requires an empty channel and separate wires placed in or pulled through the raceway. *See* Defendants' Ex. 22A. A raceway allows wires to be added at a later time or a single defective wire to be replaced without disturbing the other wires. EMT and conduit are types of raceway.

3E contends that by listing MC cable as a product approved for use on the electrical portion of the building, the specifications unambiguously provided 3E with a choice of either MC cable or raceway. Since the contract unambiguously permitted the use of MC cable on the lighting system, 3E asserts, its interpretation regarding the use of MC cable was reasonable. Shea disagrees, relying on the provision describing the universal wiring standard which, it asserts, limits the method of wiring for all concealed dry interior locations to the use of some form of raceway. In the alternative, Shea contends that any ambiguity created by the erroneous inclusion of MC cable in the universal product list would have imposed a duty on 3E to seek clarification. For the reasons that follow, the Court concludes that the specifications of the contract relating to the lighting are patently ambiguous.

Section 16050 of the Project Manual, entitled "Basic Electrical Materials and Methods," generally describes the requirements to be followed and products to be used in the installation of the discrete electrical systems. Detailed information regarding the separate electrical systems follows the "Basic Electrical Materials and Methods" section, each in its own section. The subsection of the "Basic Electrical Materials and Methods" section entitled "Wiring Standard" provides "Use only the following approved wiring methods ... Concealed Dry Interior Locations: Building wire in rigid steel conduit (RSC) or electrical metallic tubing (EMT), or flexible steel conduit." Plaintiff's Ex. 1, Project Manual at 16050 § 1.7(A)(6). In listing the products to be used

throughout the electrical systems, the subsection of the "Basic Electrical Materials and Methods" section entitled "Wire and Cable" lists metal clad cable or MC cable as a permissible product to be used on the project. Plaintiff's Ex. 1, Project Manual at 16050 § 2.10(C).

The Project Manual limits the universal method for installing all wire to the use of building wire in a raceway or conduit. *See* Plaintiff's Ex. 1, Project Manual at 16050 § 1.7(A)(6). Reference to the exclusive language of § 1.7(A)(6) alone would exclude the use of MC cable. However, the erroneous inclusion of MC cable in the product list creates confusion, particularly since the evidence established that there was no permissible use for MC cable in any electrical system in the Squadron Operations Building.<sup>2</sup> *See* Plaintiff's Exs. 52, 93, 99, 124. In addition to the erroneous inclusion of MC cable in the product list, the "Basic Electrical Materials and Methods" section also describes parameters for the "Installation of Wires and Cables" which states, in part: "Protect and support exposed cables above accessible ceilings to keep them from resting on ceiling tiles. Use running boards as necessary to provide support. Install cables to run parallel and perpendicular to building lines; do not run diagonally, leave ample slack in cable at turns." Plaintiff's Ex. 1, Project Manual at 16050 § 3.7(E). The space "above accessible ceilings" is appropriately classified as a dry interior location which, per § 1.7(A)(6), the wiring method should always be building wire in raceway or conduit. Plaintiff's Ex. 1, Project Manual at 16050 § 3.7(E). Nevertheless, § 3.7(E) requires that the "exposed cables" be "kept from resting on the ceiling tiles." Plaintiff's Ex. 1, Project Manual at 16050 § 3.7(E). Section 16500 furnishes more detailed specifications to be applied to the lighting system. Part Three of the lighting section is entitled "Execution" and provides information for the "installation, checkup, and startup" of the

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<sup>2</sup> From the testimony at trial, the Court understood that although technically there is nothing wrong with pulling MC cable through a raceway, that would not be a reasonable use, indeed it would be a waste, of MC cable.

lighting system in the Squadron Operations Building. Nothing in the section specifically addresses the use of either cable or raceway.

When interpreting contractual provisions, it is essential that a contract be interpreted as a whole in a manner that gives reasonable meaning to all of its parts and avoids conflicts in, or surplusage of, its provisions. *See Dalton*, 98 F.3d at 1305. In this case because there is no permissible use of MC cable elsewhere in the other electrical systems and it would not be reasonable to use MC cable in conjunction with raceway or conduit, the Court is unable to reasonably interpret the contract without finding a conflict in the provisions. The Court finds that, despite the general requirement that the wiring method in all dry interior locations employ the use of conduit or raceway, the erroneous inclusion of MC cable in the general products section of the electrical specifications and the reference to the use of cable above accessible ceilings in the general installation of wire and cable section of the electrical specifications created a patent ambiguity in the Project Manual regarding whether MC cable was a permissible product to be used on the lighting system. The explicit directions in section 16500 regarding the installation of the lighting system do nothing to remove the ambiguity created in the general provisions.

Mr. Wood's testimony and the evidence from his takeoff document further support the Court's patent ambiguity finding. Mr. Wood testified that he thought he could use either MC cable or EMT, and reference to the takeoff document reveals that Mr. Wood first listed EMT and subsequently replaced the EMT with MC cable when preparing his estimate to bid the job. *See Plaintiff's Ex. 3*. The Project Manual is clearly susceptible to two different interpretations. Under these circumstances, 3E failed to meet its obligation of seeking clarification on the issue of the lighting before bidding for the contract. Therefore, 3E is not entitled to an interpretation of the



contract that would allow it to recover the additional cost of providing the EMT and building wire or installing the EMT in the lighting system. *See Dalton*, 98 F.3d at 1306.

### **C. Security Alarm System**

3E also contends that by listing cable as a product approved for use on the electrical work in the Squadron Operations Building, the contract unambiguously permitted the use of fire alarm cable on the security alarm system. In addition, 3E asserts that it submitted a sample of fire alarm cable and it was approved for use in the security alarm system. Shea disagrees, relying on the provision in section 16050 describing the universal wiring standard, which, it asserts, limits the method of wiring for all concealed dry interior locations to the use of some form of raceway. In the alternative, Shea contends that any ambiguity created by the erroneous inclusion of cable in the universal product list would have imposed a duty on 3E to seek clarification. The Court concludes that the specifications of the contract relating to the security alarm system are also patently ambiguous.

As stated above with respect to the lighting, section 16050 of the Project Manual, entitled "Basic Electrical Materials and Methods," generally describes the requirements to be followed and products to be used in the installation of the discrete electrical systems, which follow, each in its own subsection. The subsection entitled "Wiring Standard" provides: "Use only the following approved wiring methods ... Concealed Dry Interior Locations: Building wire in rigid steel conduit (RSC) or electrical metallic tubing (EMT), or flexible steel conduit." Plaintiff's Ex. 1, Project Manual at 16050 § 1.7(A)(6). In listing the products to be used on the electrical systems, the subsection lists cable as a permissible product to be used on the project. *See* Plaintiff's Ex. 1, Project Manual at 16050 § 2.10(C). The "Basic Electrical Materials and Methods" section also provides parameters for the "Installation of Wires and Cables," which provides, in part, "Protect

and support exposed cables above accessible ceilings to keep them from resting on ceiling tiles.

Use running boards as necessary to provide support. Install cables to run parallel and perpendicular to building lines; do not run diagonally, leave ample slack in cable at turns."

Plaintiff's Ex. 1, Project Manual at 16050 § 3.7(E). Section 16725 furnishes more detailed specifications to be applied to the security alarm system. Part Three of the security alarm section is entitled "Execution" and provides general information for the installation of that system in the Squadron Operations Building. Two provisions of the execution section provide for the use of conduit. Section 3.1(G) states "[r]ecessed type door switches on personnel doors shall have all wiring in concealed conduit." Plaintiff's Ex. 1, Project Manual at 16725 § 3.1(G). Section 3.1(I) states that "[w]iring for DC circuits shall not be permitted in the same conduit or tubing as wiring for AC circuits." Plaintiff's Ex. 1, Project Manual at 16725 § 3.1(I). This section also contains two discrete references to cable in the execution section of the security alarm system provisions. *See* Plaintiff's Ex. 1, Project Manual at 16725 § 3.1(C) and § 3.1(D). However, nothing in section 16725 specifically addressing the security alarm system explicitly states that conduit or raceway is required.

Construing the contract as a whole, the Court finds that despite the general requirement that the wiring method in all dry interior locations be limited to the use of conduit or raceway, the erroneous inclusion of MC cable in the general products section of the electrical specifications and the reference to the use of cable above accessible ceilings in the general installation of wire and cable section of the electrical specifications created a patent ambiguity in the Project Manual regarding whether all wiring needed to be housed in raceway. The explicit provisions in section 16725 regarding the installation of the security alarm system do nothing to eliminate this ambiguity. *See* Plaintiff's Ex. 1, Project Manual at 16725 § 3.1(C), § 3.1(D), § 3.1(G) and § 3.1(I). In

addition, given the ambiguity in the Project Manual, there is nothing necessarily contradictory between the evidence of the owner's approval of 3E's submission of a sample of the fire alarm cable it proposed using for the security alarm system and the owner later insisting that the fire alarm cable be put in a raceway or conduit. Plaintiff did not present evidence that the owner's approval of 3E's use of fire alarm cable for the security alarm system was on the basis that the cable alone would be used or that the owner represented that the cable would not need to be installed in a raceway or conduit. In the absence of such evidence, the Court will not conclude that any approval given by the owner for the use of fire alarm cable in the security alarm system also affirmatively authorized 3E's use of cable without a raceway or conduit. Here again, because 3E did not inquire about the plain contractual ambiguity on the issue of the security alarm system before bidding on the contract, it is not entitled to an interpretation of the contract that would allow it to recover the additional cost of supplying or installing EMT in the security alarm system.

#### **D. Fire Alarm System**

The parties advance the same arguments with respect to the fire alarm system as they did for the security alarm system. As before, the same general provisions are applicable. Section 16050, entitled "Basic Electrical Materials and Methods," generally describes the requirements to be followed and products to be used in the installation of the discrete electrical systems, which follow, each in its own subsection. The subsection entitled "Wiring Standard" provides: "Use only the following approved wiring methods ... Concealed Dry Interior Locations: Building wire in rigid steel conduit (RSC) or electrical metallic tubing (EMT), or flexible steel conduit." Plaintiff's Ex. 1, Project Manual at 16050 § 1.7(A)(6). In listing the products to be used on the electrical systems, the subsection lists cable as a permissible product to be used on the project. *See* Plaintiff's Ex. 1, Project Manual at 16050 § 2.10(C). The "Basic Electrical Materials and

Methods" section also provides parameters for the "Installation of Wires and Cable," which provides, in part, "Protect and support exposed cables above accessible ceilings to keep them from resting on ceiling tiles. Use running boards as necessary to provide support. Install cables to run parallel and perpendicular to building lines; do not run diagonally, leave ample slack in cable at turns." Plaintiff's Ex. 1, Project Manual at 16050 § 3.7(E). In this instance, however, the section that furnished the details to be applied to the fire alarm system provides specific information on the method for installing the fire alarm cable. Part Three of the fire alarm section is entitled "Execution" and provides for the "Install[ation of] fire alarm wiring in raceway per section 16050." Plaintiff's Ex. 1, Project Manual at 16721 § 3.1(B). With respect to the fire alarm system, the Court finds that the contract is not ambiguous.

The provisions applicable to the fire alarm system are not susceptible to more than one reasonable interpretation. Any ambiguity created in the general products and methods of wiring provisions is eliminated by the explicit direction in the fire alarm section that the fire alarm wiring be installed in a raceway. *See* Plaintiff's Ex. 1, Project Manual at 16721 § 3.1(E). As found above, although 3E submitted a sample of the fire alarm cable it proposed using for the fire alarm system to the owner and that sample was approved, there is nothing necessarily contradictory between the evidence of the owner's approval of 3E's submission of a sample of the fire alarm cable it proposed using for the fire alarm system and the owner later insisting that the fire alarm cable be put in a raceway or conduit. Plaintiff did not present evidence that the owner's approval of 3E's use of fire alarm cable for the fire alarm system was on the basis that the cable alone would be used or that the owner represented that the cable would not need to be installed in a raceway or conduit. In the absence of such evidence, the Court will not conclude that any approval given by the owner for the use of fire alarm cable in the fire alarm system also

affirmatively authorized 3E's use of cable without a raceway or conduit. The Court finds therefore that the contract terms unambiguously required 3E to use raceway in the installation of the fire alarm system. 3E is not entitled to recover for the additional cost associated with supplying or installing EMT in the fire alarm system.

### **E. Defendant's Offsets**

Defendant E.L. Shea states in its Third Affirmative Defense that "Plaintiff owes the Defendant for damages as a result of its unworkmanlike and/or improper work and materials supplied as that [sic] there is an offset due and owing." Answer to Amended Complaint (Docket No. 16). Defendant E.L. Shea does not assert this argument as a counterclaim, but, rather, as an affirmative defense. An affirmative defense is a means of preventing a party from recovering, but it does not state a claim for recovery on its own. As an affirmative defense, the offset can be used only to avoid Plaintiff's claims; it does not stand alone as a basis for recovery. Because Plaintiff 3E is not entitled to recover for its claims, there is no amount to offset against, and the Court does not need to resolve the factual disputes raised by the affirmative defense of offset.

### **III. Conclusion**

The Court **ORDERS** that Judgment be entered on Counts I and III in favor of Defendant E.L. Shea, Inc. and against Plaintiff Electrical Engineering and Electronics, Inc. The Court **FURTHER ORDERS** that Judgment be entered on Count II in favor of Defendant Fidelity and Deposit Company of Maryland and against Plaintiff Electrical Engineering and Electronics, Inc.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 15<sup>th</sup> day of March, 2001.

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